Appeal No. 2006AP939 **Cir. Ct. No. 2005CV1110**

WISCONSIN COURT OF APPEALS
DISTRICT II

ESTATE OF JAMES B. SUSTACHE, BY ITS SPECIAL ADMINISTRATOR,

JAMES SUSTACHE AND ANTOINETTE SUSTACHE,

PLAINTIFFS,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

LARRY MATHEWS AND JEFFREY W. MATHEWS,

DEFENDANTS-APPELLANTS,

CARRIE A. ROMAN,

DEFENDANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Snyder, P.J., Brown and Nettesheim, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2005-06) this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUES

1. Has the Wisconsin Supreme Court implicitly overruled the court of appeal's decision in ***Berg v. Fall***, 138 Wis. 2d 115, 405 N.W.2d 701 (Ct. App. 1987)?

2. If so, what is the status of the supreme court's opinion in ***Grieb v. Citizens Casualty Co***., 33 Wis. 2d 552, 148 N.W.2d 103 (1967)?

3. If not, does ***Berg*** conflict with ***Professional Office Buildings, Inc. v. Royal Indemnity Co.***, 145 Wis. 2d 573, 427 N.W.2d 427 (Ct. App. 1988)? If so, which opinion represents the correct law of Wisconsin?

LEGAL BACKGROUND

This is an insurance duty-to-defend case. We begin by addressing some of the case law which prompts this certification.

In ***Grieb***, a taxpayer suit alleged that Grieb, an architect, had engaged in a conspiracy with another to defraud Milwaukee county. ***Grieb***, 33 Wis. 2d at 556. Grieb successfully defended the suit and then commenced an action against his insurer to recover his costs and fees. ***Id***. at 554. The issue before the supreme court was whether Grieb's professional liability errors-and-omissions insurance policy covered the allegations in the taxpayer's complaint. ***Id***. at 556. The policy covered Grieb's liability "arising out of any act of negligence, error, mistake or omission in rendering professional architectural services." ***Id***. at 555. The insurer claimed it owed no coverage, and hence no duty to defend, on the basis of the policy exclusion for "dishonest, fraudulent, criminal or malicious acts or omissions and those of a knowingly wrongful nature intentionally committed." ***Id***. at 556.

The supreme court agreed with the insurer. The court said, "We think [the insurer's] duty to defend under its policy is not so broad as contended for by [the architect]." ***Id***. In so holding, the court followed what is now known as the "four corners" rule: "It is the nature of the claim alleged against the insured which is controlling even though the suit may be groundless, false or fraudulent." ***Id***. at 558. *See also* ***Doyle v. Engelke***, 219 Wis. 2d 277, 284 n.3, 580 N.W.2d 245 (1998). ("Accordingly, we reject Employers' proffered frame of analysis and confine our analysis to the four corners of the complaint.")

Although holding that the insurer owed no duty to defend under the "four corners" rule, the supreme court noted certain exceptions to the rule:

> There are at least four exceptions to the general rule determining the extent of the insurer's duty to defend and generally the insurer who declines to defend does so at his peril. These and allied problems are extensively covered in Anno. Liability Insurer—Duty to Defend, 50 A.L.R. (2d) 458.

Grieb, 33 Wis. 2d at 558. The supreme court's opinion did not go further to set out these exceptions or analyze them. We do so here, quoting a portion of the A.L.R. annotation cited by the court:

> [T]here are also a number of cases involving special situations not covered directly by the general rules …. These special situations exist particularly where there is a conflict of allegations and known facts, where the allegations are ambiguous or incomplete, where the allegations state facts partly within and partly outside the coverage of the policy, and finally where the allegations contain conclusions instead of statements of facts.

C.T. Drechsler, Annotation, *Allegations in third person's action against insured as determining liability insurer's duty to defend*, 50 A.L.R.2d 458, §3 (1956) (footnotes omitted).

This topic lay dormant for twenty years until ***Berg***. There, Berg sued Fall and his insurer alleging injury as the result of a physical altercation with Fall. ***Berg***, 138 Wis. 2d at 117. Fall contended that because he acted in self-defense, the insurer's exclusion for intentional conduct did not bar coverage. ***Id***. The court of appeals agreed, holding that "reasonable acts of self-defense are legally privileged, not wrongful." ***Id***. at 121. The court further held that the exclusion language in the policy was ambiguous "with respect to privileged acts of self-defense" and therefore construed the language against the insurer. ***Id***.

Interestingly, the ***Berg*** court cited ***Grieb*** for the "four corners" rule, ***Berg***, 138 Wis. 2d at 122, but not for ***Grieb***'s reference to the exceptions to that rule. Instead, the ***Berg*** court looked to a well-known and respected insurance treatise on that point:

> The insurer cannot safely assume that the limits of its duties to defend are fixed by the allegations a third party chooses to put into his complaint, since an insurer's duty is measured by the facts, particularly where the pleadings allege facts that are within an exception to a policy *but the true facts are within, or potentially within, policy coverage and are known or are reasonably ascertainable by the insurer*.
>
> 7C Appleman, Insurance Law and Practice, sec. 4683 at 56 (1979).

Berg, 138 Wis. 2d at 122-23 (emphasis added).

Shortly after ***Berg***, a different district of the court of appeals issued its opinion in ***Professional Office Buildings***.[1] There, the trial court went beyond

[1] The parties' briefs do not cite to ***Professional Office Buildings, Inc. v. Royal Indemnity Co.***, 145 Wis. 2d 573, 427 N.W.2d 427 (Ct. App. 1988). Nonetheless, we deem the case germane to this certification.

the four corners of the complaint in holding that the insured owed a duty to defend. ***Professional Office Buildings***, 145 Wis. 2d at 580. The court of appeals disagreed with this approach, ruling that the "four corners" rule was the law in Wisconsin regardless of how well reasoned the federal authority relied on by the trial court might be. ***Id***. at 580-81. In support of the "four corners" rule, the court of appeals cited to ***Grieb***, but did not discuss nor reference ***Grieb***'s acknowledgement of the exceptions to the rule. Nor did ***Professional Office Buildings*** reference ***Berg***.

In two later cases the supreme court significantly distanced itself from the holding in ***Berg***. In ***Doyle***, the supreme court said:

> Employers would have this court adopt the language of the decade old court of appeals decision, ***Berg v. Fall***, 138 Wis. 2d 115, 405 N.W.2d 701 (Ct. App. 1987), indicating that courts may be allowed to go beyond the four corners of a complaint when determining whether coverage exists. The language in ***Berg*** is, however, contrary to a long line of cases in this state which indicate that courts are to make conclusions on coverage issues based solely on the allegations within the complaint. Accordingly, we reject Employers' proffered frame of analysis and confine our analysis to the four corners of the complaint.

Doyle, 219 Wis. 2d at 284 n.3 (citations omitted). Later, in ***Smith v. Katz***, 226 Wis. 2d 798, 815-16, 595 N.W.2d 345 (1999), the supreme court echoed this criticism, quoting a portion of this language from ***Doyle***.

THE INSTANT CASE

The facts of this case are strikingly like ***Berg***, but with more tragic consequences. James Sustache, a teenager, was killed as the result of a physical altercation with Jeffrey Mathews, another teenager. Sustache's parents and his estate sued Mathews, his father, and the host of the party where the altercation

took place. American Family Mutual Insurance Company (American Family), which insured all of the defendants, was also named as a defendant. By their separate answers, all of the defendants, including American Family, asserted various affirmative defenses, including a claim that Mathews was acting in self-defense.

American Family then moved for summary judgment, relying on the intentional acts exclusion in its insurance policy. The individual defendants resisted the motion relying on ***Berg***. At the hearing on the motion, the trial court acknowledged the similarity of the facts in this case with those of ***Berg*** and, in its later written decision, the court acknowledged that despite the supreme court's strong criticism of ***Berg***, the supreme court had not expressly overruled ***Berg***. Nonetheless, the court concluded that the "four corners" rule was the proper analysis for determining coverage and therefore granted American Family's motion for summary judgment. The estate and Sustache's parents appeal.

ANALYSIS

As ***Doyle*** and ***Smith*** demonstrate, the supreme court has distanced itself from ***Berg*** with language that clearly affords American Family a reasonable basis for arguing that ***Berg*** has functionally been overruled. But it remains that the supreme court has not expressly overruled ***Berg***. We are not fans of "magic words," and we generally do not read supreme court opinions from that perspective. But "overruled" is a term of art in appellate lexicon carrying significant consequences and surely the supreme court does not lightly invoke that term. We assume that when the supreme court offered its strong criticism of ***Berg***, the prospect of overruling that decision likely occurred to the court. Yet the court did not do so.

So, like the trial court, we are confronted on the one hand with ***Berg,*** a published opinion of the court of appeals which stands unreversed, thereby constituting binding precedent that we are not free to ignore or overrule. On the other hand, we are confronted with supreme court language that seriously calls into question the continuing vitality of ***Berg***. We ask the supreme court in this certification whether its language in ***Doyle*** and ***Smith*** overrules ***Berg***.

However, the question we pose to the supreme court goes beyond the tension between ***Doyle/Smith*** and ***Berg***. If the supreme court should hold that ***Berg*** has functionally been overruled, *it remains that* ***Grieb*** *is still on the books*, and no appellate opinion has ever called ***Grieb*** into question. So this certification implicates ***Grieb*** as well as ***Berg***. ***Grieb*** is a supreme court, not a court of appeals, opinion. Under ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997), we have no authority to speak to the continuing vitality of ***Grieb*** and its acknowledgement of the law recognizing the exceptions to the "four corners" rule. That is a matter solely reserved for the supreme court, and we tender this further question to the supreme court.[2]

American Family also argues that ***Berg*** was wrongly decided because it conflicted with prior law recognizing the "four corners" rule. But ***Berg*** did not jettison the "four corners" rule; rather, it merely recognized exceptions to

[2] We have considered whether ***Grieb***'s reference to the exceptions to the "four corners" rule might be dicta since, other than acknowledging the exceptions, the supreme court did not further recite the exceptions or elaborate on them. ***Grieb v. Citizens Cas. Co***., 33 Wis. 2d 552, 558, 148 N.W.2d 103 (1967). We, however, harbor a natural reluctance to label any language of the supreme court as dicta. Moreover, the appellant in ***Grieb*** was arguing that the coverage issue was "not confined to allegations of such acts in a third-party pleading." ***Id.*** at 556. Given that argument, it would seem that the supreme court's reference to the exceptions to the "four corners" rule could hardly be labeled dicta. Regardless, we leave this question to the good judgment of the supreme court should it accept this certification.

the rule in four limited situations. Many areas of the law know exceptions. Moreover, the court of appeals' recognition of the exceptions was not something fashioned out of whole cloth. To the contrary, the exceptions had previously been acknowledged in the A.L.R. annotation cited by the supreme court in ***Grieb***, and these same exceptions are recognized in the Appleman treatise cited by the court of appeals in ***Berg***. Finally, we note that the exceptions appear to make sense when applied in the proper setting. Where the true facts of the event under inquiry are actually covered by the insurance policy despite the allegations of the complaint, it would seem unfair to deny the insured the benefit of a defense.

We also certify this case on another level. As we have noted in our discussion of the case law history, the court of appeals decision in ***Professional Office Buildings*** holds that the "four corners" rule is the proper framework for resolving a coverage determination no matter how well reasoned foreign authority to the contrary might be. ***Professional Office Buildings***, 145 Wis. 2d at 580-81. Also as noted, ***Professional Office Buildings*** cites to ***Grieb*** for the "four corners" rule, but does not discuss ***Grieb***'s reference to the exceptions to the rule. Nor does ***Professional Office Buildings*** cite to the earlier decision in ***Berg***. Thus, we have two court of appeals decisions that conflict on the question of whether the exceptions to the "four corners" rule are recognized in Wisconsin. ***Professional Office Buildings*** says they are not while ***Berg*** says that they are. If the supreme court rules that ***Berg*** is still viable, the court will have to address the conflict between ***Berg*** and ***Professional Office Buildings***.

The supreme court is the primary law-making court of this state and is the only court with authority to overrule, modify or withdraw language from a prior appellate case. ***Cook***, 208 Wis. 2d at 189. We respectfully submit that the supreme court should resolve any uncertainty as to the fate of ***Berg***, particularly

since the uncertainty is inspired by the language of the supreme court itself in ***Doyle*** and ***Smith***. We also ask the supreme court to resolve the conflict between ***Berg*** and ***Professional Office Buildings*** should the court hold that ***Berg*** is not overruled.

American Family also argues that it owes no duty to defend because self-defense is a complete defense to the plaintiffs' claims. In support, American Family cites to the law which holds that the duty to defend is measured by the duty to indemnify once the latter is determined. *See* ***Baumann v. Elliott***, 2005 WI App 186, ¶¶9-11, 286 Wis. 2d 667, 704 N.W.2d 361. As American Family puts it: "[Mathews'] conduct in this case will be either a battery, or a privileged act of self-defense. Under either scenario, there is no coverage (i.e. no duty to indemnify) under the Policy. Therefore, there is no duty to defend under the Policy."

But the correctness of this argument also hinges on the continuing vitality of ***Berg*** where the court of appeals rejected a similar argument. The court held that in a self-defense situation, "State Farm's duty to defend exists independent of any liability for monetary damages."[3] ***Berg***, 138 Wis. 2d at 122.

CONCLUSION

[3] American Family also argues that even if ***Berg*** remains good law, the language of its intentional acts exclusion differs from that in ***Berg*** and offers a separate basis for applying the exclusion. American Family relies on the portion of its intentional acts exclusion stating that the exclusion applies "even if the bodily injury … is different than that which was expected or intended." The ***Berg*** exclusion applied to bodily injury "expected or intended by the insured." ***Berg v. Fall***, 138 Wis. 2d 115, 117, 405 N.W.2d 701 (Ct. App. 1987). We do not certify this issue, and we candidly state that we intend to reject this argument if the supreme court declines to accept our certification. Despite the nuances of the differing language as to whether the result of the insured's conduct was expected or intended, it remains that both exclusions apply to intentional conduct caused by the insured.

This case offers the supreme court the opportunity to resolve whether its prior language in ***Doyle*** and ***Smith*** has functionally overruled ***Berg***. If so, the supreme court will then have to answer whether ***Grieb***'s acknowledgement of the exceptions to the "four corners" rule suffers the same fate or whether the language was mere dicta. Reduced to its essence, this certification affords the supreme court the opportunity to address in clear and unequivocal terms whether the exceptions to the "four corners" rule know a place in Wisconsin law. Finally, if the supreme court holds that ***Berg*** is still viable, the court will have the opportunity to resolve the conflict between ***Berg*** and ***Professional Office Buildings***.

We respectfully ask the supreme court to accept jurisdiction over this appeal.